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RIGHT OF ACCESS TO THE COURT OF REVIEW IN THE PROCEDURE OF RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

The procedure of recognition of a foreign arbitral award is initiated by an application and finalised by a decision by which the foreign arbitral award is recognised, or the recognition is refused. After the decision of the court of first instance, the dissatisfied party may lodge an appeal, an ordinary legal remedy within the subject-matter jurisdiction of the Court of Appeal of Montenegro.

In practice, problems may arise after the appellate court's decision on the appeal of the dissatisfied party, given different approaches, found in both theory and practice, to the admissibility of extraordinary legal remedies. No dilemmas of this type arise in theory when it comes to the admissibility of special legal remedies, such as the constitutional complaint, which is reflected in a uniform practice of the Constitutional Court of Montenegro.

This scientific paper provides an overview of legal remedies, with an emphasis on the review, which are available to the parties or which, in the authors' opinion, should be considered admissible after the court's decision to recognise or refuse to recognise a foreign arbitral award.

Keywords: foreign arbitral award, recognition procedure, court of review, constitutional court.

1. INTRODUCTION

The effect of a foreign arbitral award may not automatically extend outside the territory in which it was made, and it might happen that a party with a legal interest might need to initiate a recognition and enforcement procedure for that purpose.

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The courts in Montenegro may decide on the recognition and enforcement of foreign arbitral awards in two ways: as the main issue for which the Commercial Court of Montenegro has jurisdiction or as a preliminary issue when a party requests enforcement on the basis of a foreign arbitral award as a writ of execution which has not been previously recognised (Knežević, 2007, pp. 119-139. Pavić, 2010, pp. 34-41. Trajković, 2000, p. 569 *et seq*. Vukoslavčević, 2012b, p. 104 *et seq*).

The procedure of recognition of a foreign arbitral award is initiated by an application and finalised by a decision in which the foreign arbitral award is recognised, or the recognition is refused. After the decision of the first instance court, the dissatisfied party may lodge an appeal as an ordinary legal remedy for which the Court of Appeal has the subject-matter jurisdiction. When it comes to extraordinary legal remedies, such as the application for the protection of legality and the review, the position of theory and practice was not uniform even while the previous Law on Resolving Conflict of Laws with Regulations of Other Countries[1] was in force, and the new legal solutions have not brought to the greater uniformity of views on this matter. The admissibility of constitutional complaint as a special legal remedy does not raise any questions in theory, which is reflected in the practice of the Constitutional Court of Montenegro.

This scientific paper provides an overview of legal remedies available to the parties or which should be admissible, in the authors' opinion, after the court decides to recognise or refuse to recognise a foreign arbitral award, with an emphasis on review.

2. THE PROCEDURE FOR RECOGNITION OF A FOREIGN ARBITRAL AWARD

2.1. Certain dilemmas about the term "foreign arbitral award"

A party to the proceedings before a foreign arbitral tribunal usually enters the proceedings for the recognition of a foreign arbitral award in order to obtain its enforcement in the state of recognition. As a rule, arbitral award is condemnatory, and the main goal of the party requesting exequatur is to extend its effect to the territory where the foreign arbitral award is intended to be enforced (Vuković, 1986, p. 3).[2]

The issue of subject-matter jurisdiction is regulated by the systemic law in this area, i.e. by the Arbitration Law, which in its first article determines the scope of its application. This law regulates the arbitration itself, recognition and enforcement of arbitral awards, as well as the jurisdiction and actions of courts in connection with the arbitration (Arbitration Law of Montenegro, Art. 1). The Commercial Court of Montenegro has the subject-matter

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[1] Law on Resolving Conflict of Laws with Regulations of Other Countries, *Official Gazette of the Federal Republic of Yugoslavia*, no. 46/1996. The previous title of the law was the Law on Resolving Conflict of Laws with Regulations of Other Countries in Certain Relations. The Law came into force on 1 January 1983. After 1996, in the Federal Republic of Yugoslavia, this Law was harmonised with the Constitution by changing its title, but certain corrections were also made in terms of its content. Namely, as the title was "unusually long for our circumstances", it was changed by omitting the part "in certain relations".

[2] That is one of the differences in the procedure of recognition of foreign court awards, which do not have to be condemnatory and eligible for enforcement, which implies that the court must recognise every decision it enforces, but it is not necessary to enforce every foreign award it recognises.

jurisdiction which covers specific issues of deciding on the appointment of arbitrators, objections to the competence of the arbitral tribunal, delivery of the decision, deciding on the claim for annulment of the arbitral award and the application for recognition of a foreign arbitral award or interim measure (Arbitration Law of Montenegro, Art. 6).

The notion of "foreign arbitral award" covers any decision rendered by an arbitral tribunal not situated in Montenegro and considered a decision of the state in which it was rendered. Thus, the basic criterion for determining whether an arbitral award is to be considered a foreign arbitral award is a territorial principle, as one of the most developed criteria for the territorial localisation of arbitration (Bordaš *et al*, 2007, p. 606). What was not regulated by the domestic legislator, and may cause a dilemma in practice, are the situations in which the arbitral awards were issued on the territory of Montenegro but on the basis of the procedural law of a foreign state. Namely, since the parties in the arbitration dispute have a full freedom to agree on the law that would be applied to the merits of the dispute and the procedural law to which the procedure would be subjected, there is a real chance that the procedure would be conducted according to the rules of foreign procedural law. Will such decision, although made on the domestic territory, be considered a foreign arbitral award because the foreign procedural law was applied? It seems that our legislator has ruled out this possibility by prescribing only one criterion for determining whether the arbitral award is to be considered a foreign one. Examples from the comparative arbitration practice show that there are different legal solutions for this matter, which is reflected in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Covention prescribes the possibility of using several other criteria when determining whether an award is foreign. Namely, in the first article on the scope of its application, the New York Convention emphasises that its text applies to the recognition and enforcement of an arbitral award in a dispute between natural or legal persons rendered in the territory of a state other than the one in which recognition and enforcement of the award is sought and that it also applies to the arbitral awards that are not considered domestic awards in the state in which their recognition or enforcement is sought. Thus, for example, in Serbia (Pavić, 2010, p. 40) a foreign arbitral award is considered to be a decision made by an arbitral tribunal outside Serbia, as well as a decision made by an arbitral tribunal in Serbia if foreign law was applied to the arbitration proceedings (Arbitration Law of the Republic of Serbia, Art. 64 para. 3). In Croatia, the decision of the arbitral tribunal (award) is ascribed to the state where the place of arbitration is located (Arbitration Law of the Republic of Croatia, Art. 38). The significance of the New York Convention for this matter is also reflected in the fact that its adoption, i.e. ratification in certain states, practically created an international framework on the basis of which the signatory states are to harmonise their national legislation when it comes to international arbitration (Joelson, 2007, p. 382).

2.2. The course of the procedure

In order to extend the effects of a foreign arbitral award beyond the legal system in which it was made, the relevant legal prerequisites prescribed by the state of recognition need to be met. That means that the foreign awards are not recognised automatically

and that it is necessary to determine the existence of these prerequisites in the state of recognition. Such determination is conducted in the appropriate procedure. In this sense, we may speak of two paths for deciding on the recognition of a foreign award. Namely, the recognition of a foreign award might be subject to a special court procedure for the assessment of eligibility of a foreign award to be recognised and declared enforceable. It can also be disscussed as an incidental issue (Kostić-Mandić, Stanivuković & Živković, 2010, p. 213) in an ongoing procedure on another legal matter (e.g. litigation, enforcement or bankruptcy proceedings) (Pavić, 2010, p. 42).

The procedure of recognition of a foreign arbitral award is a special formal procedure aimed at recognising a foreign arbitral award, i.e. making its effects equal to the effects of a domestic award, and this, according to most authors, is to be done in the non-litigious proceedings (Bordaš *et al.*, 2007, p. 548), which is most often justified by pragmatic reasons or the need for the speedy resolution of the matter at hand.

In the recognition procedure, the foreign arbitral award is also declared enforceable, which is followed by a special enforcement procedure. The enforcement, in principle, does not fall within the procedure of recognition of foreign awards, but in this procedure the award is only declared enforceable, as is the case with domestic awards. In the same manner, it is possible not to have a special procedure for declaring the foreign award enforceable but to have it incidentally assessed within the enforcement procedure through the assessment of whether the prerequisites for enforcement are met.

The recognition and enforcement procedure are initiated by a petition of the parties participating in the arbitration proceedings, or possibly by their legal successors. The parties need to enclose the following documents:

- The original arbitral award or its certified copy;
- Arbitration agreement or document on its acceptance in the original or certified copy;
- Certified translation of the foreign arbitral award and the arbitration agreement in the Montenegrin language and in the language in the official use before the competent court (Arbitration Law of Montenegro, Art. 51 par. 2).

The procedure of recognition of foreign arbitral awards is carried out through the application of a system of a limited control, according to which the examination of the award is done exclusively with regard to the prerequisites established by law (Lu, 2006, pp. 757-762). The court does not go into examining the merits of the award, except for its compatibility with the public policy as a condition for recognition (for more on public policy, see Tapola, 2006, pp. 151-164. Carodine, 2007, pp. 1192-1195. Harris, 2007).

Recognition of a foreign arbitral award may be refused only if the competent court finds that the conditions concerning: the arbitration agreement; respect for the right to defence; arbitration procedure; exceeding the powers of arbitrators or the composition of the arbitral tribunal are not met, if the party opposing recognition proves that:

- The arbitration agreement is not valid under the applicable law, as determined by the parties in the agreement, or under the law of the state in which the award was made;
- The party was not duly informed about the appointment of the arbitrator, or the arbitration procedure or the party was not able to express its views for some other reason;

- The award refers to a dispute that was not covered by the arbitration agreement, or that goes beyond the limits of that agreement; the partial refusal of recognition is possible if it is determined that the part of the award exceeding the limits of the arbitration agreement may be separated from the rest of the award;
- The choice of the arbitral tribunal or the arbitral proceedings were not in accordance with the arbitration agreement or, in the absence of such an agreement, in accordance with the law of the state where the arbitration takes place;
- The award has not yet become binding on the parties, or the award has been annulled or its enforcement suspended by the court which made the award or by the court which declared the award enforceable (Arbitration Law of Montenegro, Art. 52 para. 1).

Also, other than upon objection of a party, the court of recognition must take care *ex officio* of two prerequisites in order to protect the domestic legal order. These concern the question of arbitrability (for some views on arbitrability, see Sajko, 2010, pp. 961-969. Damjanović, 2015, pp. 357-361) or suitability of a dispute to be resolved by arbitration under Montenegrin law and the compatibility of the effects of a foreign arbitral award with the Montenegrin public order.[3]

In the procedure of recognition of a foreign arbitral award, the Commercial Court is to limit itself to examining whether the conditions prescribed by law are met. If it finds it necessary, the court may request further clarifications from the arbitral tribunal which made the award, from the parties and the court, or from the notary or other person with whom the decision was deposited (Arbitration Law of Montenegro, Art. 54 para. 1). The party who opposes the recognition of a foreign arbitral award has the right to state its position in the proceedings on the petition for recognition, while the statement on the petition for enforcement is allowed only if this would not jeopardise the successful completion of the requested enforcement (Arbitration Law of Montenegro, Art. 54 para. 2 and 3).

In particular, the court before which the application for recognition has been lodged must inform the respondent and allow the respondent to respond to that application and participate in the proceedings. That primarily refers to the submission of evidence on the non-existence of prerequisites for recognition, which is usually the main strategy of the respondent. There may be certain facts and circumstances that the court would not find out if the parties were not given an opportunity to state their views (Grbin, 1980, p. 183). It follows from this that the argument that both the petitioner and the respondent should be given the opportunity to state all relevant facts and circumstances in an adversarial procedure is absolutely justified. If the recognition procedure were non-adversarial, the respondent could be denied to prove that, for example, the right to defence was not respected in the award procedure for which recognition is sought or that the decision was made under duress (Vukoslavčević, 2012, p. 102).

There is also an opposite view in theory, according to which the procedure for recognition of foreign awards should be conducted as non-adversarial proceedings (Vuković & Eduard, 2005, pp. 488, 489). The main argument here is that even in non-adversarial proceedings,

[3] For more on public order as a condition for recognition of foreign awards, see Vukoslavčević (2012a, pp. 200-211).

the parties could point to the relevant facts, with the difference that they could avail themselves of this opportunity only if the court deems it necessary. The proponents of non-adversarial proceedings point to their simplicity, speed and efficiency as their main advantages. On the other hand, they see the possibility of leaving an unscrupulous party a room to file unfounded complaints as the main shortcoming of adversarial proceedings, which delays and increases the cost of proceedings. However, if in the procedure of recognition of a foreign award, which was conducted as a non-adversarial one, the party have had no opportunity to state all relevant facts and circumstances, it would certainly use this opportunity in the appellate procedure which, no doubt, may further prolong the entire procedure and increase the costs (Vukoslavčević, 2012, p. 103).

After conducting the procedure, the Commercial Court issues a decision recognising the foreign arbitral award or refusing the recognition. This decision is of declaratory nature, and the court of recognition therein takes a legal position regarding the fulfilment of prerequisites for extending the effects of a foreign award on the domestic territory. If the recognition of a foreign arbitral award was decided upon in a special procedure, this decision has *erga omnes* effects and, in accordance with the provisions of the Arbitration Law, must be reasoned (Arbitration Law of Montenegro, Art. 54 para. 4). The reasoning is required as a way to show the fulfilment of the itemised list of prerequisites for the recognition of a foreign award. The decision has *ex tunc* effect, which means that the recognised foreign award produces legal effects from the moment it was made, not from the moment of its recognition.

3. LEGAL REMEDIES AGAINST THE DECISION ON RECOGNITION/REFUSAL OF A FOREIGN ARBITRAL AWARD

In the procedure of recognition of a foreign arbitral award, the Arbitration Law envisiges a two-stage decision-making process so that an appeal may be lodged against the decision rendered in the exequatur procedure. The Court of Appeal of Montenegro has the subject-matter jurisdiction to decide in the appellate procedure. Appeal is timely if it was lodged within 15 days from the date of delivery of the decision on recognition/refusal of recognition (Arbitration Law of Montenegro, Art. 54 para. 5). An appeal may be lodged both against the decision on the recognition of a foreign arbitral award and against the one by which the recognition of a foreign arbitral award was refused.

The Arbitration Law does not contain provisions on other legal remedies,[4] which leaves open the question of admissibility of extraordinary legal remedies, such as the application for protection of legality and the review. During the Federal Republic of Yugoslavia, and later, the State Union of Serbia and Montenegro, according to the interpretation given by the Supreme Court of Serbia, an application for the protection of legality was allowed while the

[4] The identical normative legal situation exists in the neighbouring countries, such as the Republic of Croatia and the Republic of Serbia, whose laws governing arbitration contain only norms governing the appeal procedure against a decision on recognition, while conclusions on possible extraordinary remedies can be made only on the basis of court practice and legal theories.

review was considered an inadmissible legal remedy.[5] The position on the inadmissibility of review was also taken in the recent Montenegrin court practice,[6] and as such raised several questions that merit further examination of scholars and professionals. All this is due to the need to allow the unhindered enjoyment of the right to an effective remedy and the right of access to court as an integral part of the right to a fair trial, guaranteed by the Constitution of Montenegro and the European Convention on Human Rights and Fundamental Freedoms.

It is important to analyse the admissibility of legal remedies in the procedure of recognition of foreign arbitral award through the practice of constitutional and other courts. In order to do so, we will identify, through a hypothetical example, the available mechanisms for the enjoyment of the right to legal remedy, i.e. identify the ordinary, extraordinary and special remedies that are available to the parties dissatisfied with the outcome of the proceedings before the first instance or higher courts.

Petitioner A and respondent B (who will be the complainant lodging a constitutional complaint in a later procedure) concluded an agreement on the implementation of an investment in the territory of the state of the respondent, which contained an arbitration clause stipulating that any dispute not settled amicably is to be resolved through arbitration. The same provision stipulated that, unless the parties otherwise agreed, aany dispute would be settled through international arbitration in a procedure conducted by an international arbitration institution designated in the contract in accordance with the arbitration rules of that designated arbitration institution, if any, or according to the UNCITRAL arbitration rules at the discretion of that arbitration institution.

After a dispute on non-compliance with certain provisions of the main contract arose, petitioner A enforced the arbitration clause before the International Court of Arbitration of the International Chamber of Commerce in Paris, which ended the dispute by making an arbitration award.

Petitioner A initiated before the Commercial Court of Montenegro the procedure of recognition of a foreign arbitral award and, in this specific case, four first instance decisions were issued. The Commercial Court refused to recognise the foreign arbitral award in all four rulings.

In the appellate procedure for which the Court of Appeals has the subject-matter jurisdiction, the first three first-instance decisions of the Commercial Court were revoked, while the fourth decision was reversed by the Court of Appeal deciding to recognise the arbitral award of the International Court of Arbitration in Paris.

Respondent B filed an application for review before the Supreme Court against the decision of the Court of Appeal reversing the first-instance decision of the Commercial Court, and after that, it lodged a constitutional complaint.

In the procedure for recognition of a foreign arbitral award, the respondent pointed out the incompetence of the International Court of Arbitration, which issued the award, as the

[5] Legal understanding adopted at the session of the Civil Division of the Supreme Court of Serbia on 16 December 1991, in: *Izbor sudske prakse*, number 10/2005.

[6] Supreme Court of Montenegro: Rev. br. 662/12, of 11 September 2012; Rev. br. 66/15, of 29 January 2015; Rev. br. 745/17, of 25 October 2017.

obstacle to its recognition. The respondent noted that the main contract lacked a precise provision on the arbitration institution before which the resolution of a potential future dispute among the parties is to be resolved. The Court of Appeal held that petitioner A did not violate the principle of equality of arms in the arbitration proceedings by initiating the procedure before the Paris arbitration and that respondent B, apart from raising objections against its jurisdiction, also had the opportunity to challenge for the same reasons its arbitral award before the French state court,[7] where the possible annulment of the arbitral award would then be a reason for refusing recognition or enforcement. The Court also noted that the respondent did not use the possibility to designate an arbitral institution under Article IV, paragraphs 3 and 5 of the European Convention on International Commercial Arbitration 1961, nor did the respondent state which arbitration institution it intended to designate, *i.e.* which court, in its opinion, would be competent to resolve the dispute. By taking into account the existence of an arbitration agreement, the second instance court concluded that the general condition for the validity of any agreement, including an arbitration agreement,[8] is consent of the will of the parties, and that the will must be expressed in a clear and unambiguous way in order to establish with certainty the intention of the parties to exclude the dispute under a particular contract from the jurisdiction of the national court and entrust it to arbitration for settlement. The arbitration clause from the main contract was characterised as incomplete because the name of the arbitration institution or its seat was not explicitly stated. It was also stated that the interpretation of this incomplete clause required interpretation of the contract and contractual documents (documents related to the contractual relationship) and to take into account the overall circumstances of the case, which together form the entirety of the concrete contractual relationship, in order to determine the intention of the parties in general, and in particular their intentions in relation to the arbitral institution. Since no rules different from those of the ICC International Arbitration Court were included in the main contract, unlike the Commercial Court, the Court of Appeal concludes that the parties intended the disputes to be resolved by ICC arbitration and that, unlike the court of first instance which applied a strict linguistic interpretation of the arbitration clause, the Court of Appeal conducted an interpretation of the arbitration clause by applying principles that ensue from the comparative arbitration law. The Court of Appeal also noted that liberalisation, *i.e.* easing strict rules on the form of the arbitration agreement, is the only solution for disputes involving an incomplete arbitration clause. For these reasons, the challenged decision was reversed and the foreign arbitral award was recognised.

While deciding on the review initiated by respondent B, the Supreme Court rejected this legal remedy as inadmissible by pointing out that: *In the procedure initiated by petition for recognition of a foreign arbitral award, i.e. an award granted by the International Court of Arbitration, the court does not assess a legal relationship or a subjective right, but deals exclusively with the question of whether the conditions for its recognition were fulfilled. Therefore, the final decision recognising the award of the foreign arbitral tribunal is not to be*

[7] This is an action for annulment, which is also allowed in our legal system as a legal remedy available to the parties to challenge a domestic arbitral award.

[8] On some aspects of the form of an arbitration agreement, see Uzelac A. The Form of the Arbitration Agreement and the Fiction of Written Orality, How Far Should We Go? *Croatian Arbitration Yearbook*. 2001(8), pp. 83-107.

considered a decision under Article 414, paragraph 1 of the Code of Civil Procedure,[9] *which leads to the conclusion that the review is inadmissible. Namely, the rules of procedure for the recognition of a foreign arbitral award are prescribed by the Arbitration Law. Pursuant to the provision of its Article 54, para. 5, an appeal may be lodged with the Court of Appeal of Montenegro against the decision rendered in the procedure of recognition of a foreign arbitral award within 15 days from the date of delivery of the decision on recognition. The mentioned law does not provide the possibility of filing an application for review against the final decision of the second instance court on the recognition of a foreign arbitral award, which is why the review is inadmissible, and should be refused as such.*

After the decision of the Supreme Court to refuse the review, Respondent B filed a constitutional complaint with the Constitutional Court of Montenegro. The decision of the Constitutional Court[10] in this case corresponds to the position of the authors on the admissibility of review in the procedure of recognition of a foreign arbitral award in the context of the right of access to court of review. In the analyzed decision, the Constitutional Court raised the basic constitutional law question on the criteria for assessing whether the right of access to court of the complainant lodging the constitutional complaint was violated in this case. In other words, the Constitutional Court asked whether in the constitutional order of Montenegro, according to the state of the applicable legislation, the review is allowed in the procedures of recognition of foreign arbitral awards.

Since the provision of Article 54, paragraph 5 of the Arbitration Law prescribes that an appeal may be lodged against a decision rendered in the procedure of recognition of a foreign arbitral award with the Court of Appeal of Montenegro, the Constitutional Court concludes that the legislator had a clear and unequivocal intention to provide the parties to the procedure of recognition of foreign arbitral award with an effective method of legal protection against the decision made by the Commercial Court in that procedure. The rule laid down in Article 54, paragraph 5 of the Arbitration Law limited itself to explicitly stating that appeal is a regular legal remedy.[11] However, this provision of the named law in a legal order based on the rule of law, the Constitutional Court concludes, cannot be interpreted in such a way that the legislator has absolutely ruled out the possibility of filing available extraordinary legal remedies, including the review, against the mentioned decisions of the Commercial Court, as may be concluded from the Supreme Court's ruling that the Arbitration Law "*does not provide for the possibility of filing an application for review against the final decision of the second instance court recognising a foreign arbitral award, which is why the review is inadmissible and should be rejected as such*".

The Constitutional Court found that the Supreme Court approached this issue excessively formalistically, applicable law was applied "mechanically", without taking into account

[9] The Code of Civil Procedure, *Official Gazette of Montenegro*, No. 48/18, 51/17, 34/19, which states as follows: "The parties may also apply for the review against the decision of the second instance court by which the procedure was finalised."

[10] Constitutional Court of Montenegro, no. U-III 1624/18, of January 29, 2019.

[11] The provisions of the Arbitration Law of the Republic of Croatia (Article 49, paragraph 5) and the Arbitration Law of the Republic of Serbia (Article 68, paragraph 2) regulate the issue of admissibility of legal remedies in the same way, regulating only an appeal as a regular remedy, from which we must not conclude about the *a priori* inadmissibility of extraordinary legal remedies.

the specifics and importance of the legal area to which a particular court proceeding belongs and without a comprehensive consideration of the legal issue in the light of other relevant regulations, as well as the relevant features of the constitutional and legal order of Montenegro, including the constitutional role of the Supreme Court. An objective legal order in a democratic society, based on the rule of law, cannot be built, and the protection of constitutional rights of parties in court proceedings cannot be based on reasons that are not based on a comprehensive approach to law and interpretation of legal norms in accordance with the Constitution. From the perspective of protection of constitutional rights of parties, in court proceedings, the application of applicable laws to specific cases will always be constitutionally and legally unacceptable if it neglected general principles of Montenegrin legal order based on the rule of law and protection of individual constitutional rights of individuals and other parties in the proceedings. That was expressed in this particular case when a legal provision was interpreted in isolation and mechanically, regardless of the guarantees of a fair trial and other values protected by the Constitution, without considering the fact that the Constitution reflects comprehensive principles of a fair trial in connection with which all national laws, regulations and other legal acts must be interpreted. Such an interpretation given by the Supreme Court, in the opinion of the Constitutional Court, led to a restriction of access to the court of review because it had no legitimate aim and, as such, could not be considered consistent with Article 32 of the Constitution[12] and Article 6, paragraph 1 of the European Convention[13].

We have seen that the analyzed provisions of the Arbitration Law do not exclude the legal possibility of filing an application for review against the final decision of the second instance court on recognition of a foreign arbitral award (which regulates only the right to appeal), so it seems necessary to analyze Article 414, paragraph 1 of the Law on Civil Procedure, which prescribes that the parties may apply for a review of the decision of the second instance court by which the procedure was finalised. This is especially due to the fact that the Supreme Court, in the decision refusing review which is the subject of the constitutional court control, took the position that "a final decision recognising the award of a foreign arbitral tribunal is not considered a decision under Article 414, paragraph 1 of the Law on Civil Procedure, and therefore the review is not allowed". The court found the reason for its position in the fact that "in the procedure regarding the petition for recognition of a foreign arbitral award – the decision of the International Arbitration Court - the court does not assess the legal relationship or subjective right, but deals exclusively with assessing the fulfilment of conditions for its recognition." Accordingly, it may be concluded that the Supreme Court considers that in the legal order of Montenegro, the review is allowed only if the nature of the dispute or procedure is such that the domestic

[12] Everyone has the right to a fair and public trial within a reasonable time by an independent and impartial tribunal established by law.

[13] In determining his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly, but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

court deals with the assessment of legal relationship and/or subjective right, by which all second-instance decisions on the recognition of a foreign arbitral award are, *a priori*, excluded because those decisions deal "exclusively with the assessment of the fulfilment of the conditions for its recognition".

In its decision, the Constitutional Court rightly points out that from the constitutional law perspective the relevant fact is that the Supreme Court, as a court of review in the procedure of recognising a foreign arbitral award, has the legal possibility to change the individual legal situation of the parties (petitioner and respondent) which arises from the second instance decision of the Court of Appeal on the recognition and/or non-recognition of a foreign arbitral award. Accordingly, the meritorious review of these decisions of the Court of Appeal before the Supreme Court enters into the essence of the right to the court of each petitioner, or respondent, as party in the procedure of recognition of a foreign arbitral award. Therefore, the legal provisions on legal remedies for the protection of parties in the procedure of recognition of foreign arbitral award must be interpreted and applied so that their protection is not theoretical or illusory but effective and efficient. In the disputed decision, the Supreme Court did not provide sufficient and relevant reasons to convincingly show that in the legal order of Montenegro, based on the rule of law, the recognition of foreign arbitral awards cannot be subject to the review procedure. With such a state of affairs, it must be concluded that the manner in which the Supreme Court, as a court of review, interpreted and applied the relevant laws in this particular case, did not achieve the purpose of the constitutional guarantee of the "right to a court". Consequently, the very essence of the right of the respondent (the complainant lodging the constitutional complaint) of access to the court of review, guaranteed by Article 32 of the Constitution and Article 6, paragraph 1 of the Convention, was violated.

The practical significance of the Constitutional Court's actions in this case is manifold, in particular if we keep in mind that this is the first case in Montenegrin constitutional court practice in which the issue of access to the court of review in the procedure of recognising a foreign arbitral award was raised. Although the proceedings of the court are *in concreto*, related to an individual case, this case is not only concerned with the assessment of the interpretation and application of the right to a legal remedy in an individual case. The answer to the constitutional legal question of whether the decisions of lower instance domestic courts, recognising or refusing recognition of foreign arbitral awards, are subject to review by the highest court in Montenegro, which has a constitutional function to ensure uniform application of the law by the courts, paves the way for all future identical cases. Given the applicable legislation and the legal nature and importance of these legal cases for the parties to the proceedings, which in some cases, under certain circumstances, raised the issues of public interest, the answer to the question may not be negative. Another argument for this conclusion lays in the legal situation in which the Court of Appeal revoked three times the first instance decision of the Commercial Court and it reversed it in its fourth and final ruling. We can undoubtedly conclude that there is an important public interest for the Supreme Court, as the highest court in the country, to respond on the merits to the disputed legal issues and thus ensure uniform application of the law in all future cases where these legal issues would arise.

After the decision of the Constitutional Court of Montenegro, the Supreme Court, in the repeated procedure, ignored the clear instructions found in it, maintaining the same position on the inadmissibility of review and issued a decision similar in content to the previous one revoked by the Constitutional Court. The decision in question was subject of a dispute before the Constitutional Court in a new procedure on a constitutional complaint, which again ended by revoking decision of the Supreme Court.[14]

In the new decision, the Constitutional Court concludes that in the disputed decision, the Supreme Court did not provide sufficient and relevant reasons to convincingly show that in the Montenegrin legal order based on the rule of law, recognition of foreign arbitral awards cannot be subject to review. With all this in mind, it must be concluded that the manner in which the Supreme Court, as a court of review, interpreted and applied the relevant laws in this particular case did not achieve the purpose of the constitutional guarantee of the "right to a court". Consequently, the very essence of the right of the respondent (the complainant) of access to the court of review, guaranteed by Article 32 of the Constitution and Article 6, paragraph 1 of the Convention, was violated.

From the perspective of the principles of rule of law, legal certainty for the parties and their legitimate expectations, it will be interesting to follow the further actions of the Supreme Court after the latest decision of the Constitutional Court. That is for the reason that the imperative provisions of the Constitution and the Law on the Constitutional Court prescribe the duty to comply with and enforce the decisions of the Constitutional Court. Namely, the provision laid down in Article 151, paragraph 3 of the Constitution stipulates that the decisions of the Constitutional Court are binding and enforceable, the provision of Article 3 of the Law on Constitutional Court stipulate that everyone shall comply with the decisions of the Constitutional Court and that the views on certain issues expressed in the decisions of the Constitutional Court are binding on all state authorities, while the provision of Article 52, paragraph 1 of the same law prescribes that state authorities are required to enforce the decisions of the Constitutional Court which are within their competences. Moreover, pursuant to Article 76, paragraph 1 of the Law on Constitutional Court, the Constitutional Court is authorised, when it finds that the disputed individual act violated human rights or freedoms guaranteed by the Constitution, to uphold a constitutional complaint and repeal the act, and return the case for retrial to the body that issued the repealed act. That implies that the Constitutional Court is authorised to determine the manner of eliminating the harmful consequences of the established violation of the right or freedom guaranteed by the Constitution, as it did in this case. This further means that in a situation where a retrial is ordered due to an identified violation of the rights or freedoms guaranteed by the Constitution and the European Convention on Human Rights, the enforcement of a decision of the Constitutional Court does not imply only a formal issuance of a new decision by that court, as the Supreme Court did in this case, but also the actions and decisions of the Court to be in accordance with the legal reasons set out in the decision of the Constitutional Court which is to be enforced, as required pursuant to Article 77, paragraph 2 of the Law on the Constitutional Court.

[14] Constitutional Court of Montenegro, no. U-III 1328/19, of January 28, 2021.

4. CONCLUSION

The answer to the question of whether access to a court of review is allowed in the procedure of recognition of foreign arbitral awards should not be seen as a complicated one, at least from a normative point of view. The constitutional guarantee of the right to a court in correlation with the right to a legal remedy should ensure that the normative basis also receives its practical affirmation. However, the latest Montenegrin court practice in the procedure of recognition of foreign arbitral awards, as we have seen, relativises and ultimately denies the right of access to a court of review following an appellate decision, by citing primarily the former Yugoslav and Montenegrin court practice. It is not necessary to emphasise the court practice as a source of law and its legally nonbinding character in European continental legal systems. Reconsideration of the previously taken positions and changes in the court practice is expected and in accordance with the overall social changes and trends. If the deviation from the previous court practice ensues from a compliance with a decision of the Constitutional Court, the task of a judge of an ordinary court should be significantly simplified when taking into account the fact that everyone is required to comply with the decisions of the Constitutional Court.

Interpretation of legal norms and application of applicable law to specific cases will always be constitutionally and legally unacceptable if it neglects the general principles of the Montenegrin legal order based on the rule of law. Isolated interpretation of a legal provision, such as the absence of an explicit norm on admissibility/prohibition of review, independently of guarantees of a fair trial and other values protected by the Constitution and by disregarding the fact that the Constitution contains the overarching principle of a fair trial in relation to which all laws, regulations and general acts in the state are to be interpreted, is unacceptable.

The right of access to the court of review in the procedure of recognition of foreign arbitral awards has its normative basis and is practically feasible, as only in this way, the authors believe, can the constitutional guarantee of the right to a court be realised, which was also finally confirmed by the decision of the Constitutional Court of Montenegro.

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